United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1205

To be argued by
MARC MARMARO

b
BJS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1205

UNITED STATES OF AMERICA,

Appellee,

—v.—

MAURICE BROWN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Maurice Brown appeals from a judgment of conviction entered on February 24, 1976, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Lawrence W. Pierce, United States District Judge, and a jury.

Indictment 75 Cr. 77, filed January 24, 1975, charged Maurice Brown in nine counts with transporting and causing to be transported in interstate commerce from New York, New York to Denver, Colorado, nine forged American Express money orders in violation of Title 18, United States Code, Sections 2314 and 2.*

* At the commencement of the trial, Counts Seven and Nine of the indictment were dismissed upon the application of the Government. (Tr. 8).

References to pages of the trial transcript and to Government exhibits are abbreviated herein as "Tr." and "GX", respectively.

Trial commenced on January 13, 1976 and concluded on January 15, 1976 when the jury found Brown guilty on Counts One and Two. A mistrial was declared as to the remaining counts.

On February 24, 1976, Judge Pierce sentenced Brown to a five-year term of imprisonment on each of Counts One and Two, to run concurrently.

Brown is presently serving his sentence.

Statement of Facts

The Government's Case

On July 2, 1973 the American Express Company ("American Express") mailed forty sequentially numbered money orders to one of its agent, Wonder Food Store, ("Wonder"), located in Bronx, New York. Around the time that these money orders were mailed, Wonder was burglarized and among the items the owner recognized as missing was a machine used to validate American Express money orders. According to the records of American Express, the shipment of money orders was never received by Wonder (Tr. 17-21, 26, 37-38; GX 9, 20).

In the summer of 1973, the defendant, Maurice Brown asked Tennyson Hall, a man whom he had previously met at the racetrack, to cash two money orders for him. To explain his request, Brown told Hall that he did not have a bank account. Both money orders were completed by Brown in Hall's presence, with Hall named as the payee and a third party, having a nonexistent address in Massachusetts, listed as the "sender." (Tr. 52, 181-182); GX 4, 5, 19).* On August 17, 1973 Brown accom-

* The American Express money orders had designated areas on their front side for the date, payee and the sender's name and address.

panied Hall to two different branches of Manufacturers Hanover Trust Company ("MHTC") to cash the two money orders. The first money order was cashed by Hall at a branch located in Queens, New York. After leaving the bank, Hall gave the proceeds of the money order to Brown, who had waited outside. Later that same day, at Brown's request, Hall attempted to cash the second money order in a Manhattan branch of MHTC. Since Hall did not have enough money in his account to cover this money order, he was required to deposit it in his account and to return a few days later after it had cleared. Consequently Hall returned to the bank a few days later, withdrew the money and gave it to Brown as soon as he left the bank. (Tr. 47-51; GX 4, 5).* After being deposited and cashed, these money orders were processed by MHTC in New York, New York and sent through banking channels to Denver, Colorado. (Tr. 114-116).

Shortly thereafter, at Brown's request, Hall asked Ruby Burns, a young woman whom he had been dating, to cash two money orders for him. Brown gave these money orders to her in completed form. The payee was filled in as Ceceila Torres and the sender was listed as Juan Torres, Albany, New York.** Burns cashed these money orders on successive days at a bank in Queens, New York. On each occasion, Burns went to the bank accompanied by Brown and Hall, cashed the money orders and gave the proceeds to Brown. (Tr. 55-57, 82-92; GX

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* The money orders which Hall cashed for Brown, GX 4 and 5, were the subjects of Counts Four and Five respectively, as to which there was a mistrial.

** In March, 1974, when Special Agent Joseph Monroe of the Federal Bureau of Investigation ("FBI") went to the address in Albany listed on these money orders, he found that the resident was a man named Andy Furman, and that no one named Juan Torres lived at that address.

3, 6, 11, 12, 13). Both of the money orders cashed by Burns were ultimately processed by Marine Midland Bank in Manhattan and were sent on to Denver, Colorado by the Federal Reserve Bank of New York. (Tr. 119-122).*

Brown personally cashed one of the money orders at Aqueduct Racetrack in Queens, New York. The payee of this money order was Maurice Brown and the sender was listed as Helen Cooper, whose address as recorded on the money order turned out to be a Jewish synagogue. This money order was deposited by the racetrack at Morgan Guaranty Trust Company in Manhattan and was sent by that bank to its correspondent bank in Denver, Colorado. (Tr. 124-127, 182-85; GX 1).**

The remaining two money orders charged in the indictment were made payable to Brown and were deposited in or cashed against a checking account in the name of Maurice Brown at National Bank of North America ("NBNA"). One of these money orders listed the sender as Carol Lynn, residing at 145 West 135th Street, in New York City.*** After being negotiated, both money orders were sent by NBNA to a branch in Manhattan where they were processed and forwarded to the Federal Reserve Bank in Denver, Colorado. (Tr. 141A-147, 184-185; GX 2, 7, 16, 24, 25).****

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* The money orders cashed by Burns, GX 3 and GX 6, relate to Counts Three and Six, respectively, as to which there was a mistrial.

** The money order cashed by Brown at the racetrack, GX 1, relates to Count One as to which the jury convicted Brown.

*** Special Agent Thomas Quinn of the FBI was unable to find a person named Carol Lynn at the address listed on the money order. (Tr. 184-185).

**** The money orders cashed or deposited at NBNA, GX 2 and 7, relate to Counts Two and Seven, respectively. The jury returned a guilty verdict on Count Two and did not reach a verdict on Count Seven.

At the time of his arrest, Brown was shown copies of the seven money orders by Thomas A. Quinn, Special Agent of the Federal Bureau of Investigation ("FBI"). At that time Brown denied having given money orders to individuals to cash for him, but admitted that his signature appeared on three of the money orders. However, even as to the money orders having his signature Brown said that he could not recall where he had obtained them and that the senders' names and addresses were unfamiliar to him. (Tr. 174-177; GX 1, 2, 7).

After his arraignment, Brown approached FBI Agent Quinn, who was standing with Special Agent Susan Monserrate in the courthouse lobby. Brown asked Quinn whether he would have been arrested had he told Quinn where he had obtained the money orders. When Quinn replied that he thought Brown did not know the origins of the money orders, Brown smiled and asked again if he would have been arrested had he disclosed where he had obtained the money orders. (Tr. 179-180, 204-205).

Arthur Fleming testified that during 1970-1971, Brown agreed to show Fleming how to earn money through the use of bank checks or bank books. Subsequently, when he found a check made out to his father, Fleming contacted Brown. Brown then met with Fleming, copied the bank and the account number from the check, and explained to Fleming that he would make money by cashing a payroll check against the account. Brown then examined a group of cancelled checks belonging to Fleming's father and demonstrated his technique. Brown took a blank payroll check, filled in the amount and made it payable to Fleming's father. He then signed Fleming's father's name and entered on the back of the payroll check the account number of one of the cancelled checks. Brown said that he would cash the

check against Fleming's father's account but that the bank, rather than Fleming's father, would lose money. (Tr. 217-221). Brown then made out another blank check and told Fleming to cash it at a bank. Brown said that Fleming should approach the youngest teller and that he should use his wits. Fleming cashed the check and spilt the proceeds with Brown. (Tr. 221).

The Defense Case

The defense presented no witnesses.

ARGUMENT

POINT I

The Trial Court Correctly Permitted Introduction Of Similar Act Evidence.

Brown contends that the trial court erred in permitting the introduction of evidence (1) that Brown's fingerprint had been found on an additional one of the money orders which had been sent by American Express to Wonder and (2) that Brown had previously been engaged in activities relating to the cashing of forged checks.* This contention is frivolous.

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* As the evidence relating to Brown's prior checking forgoing activities was being presented to the jury, Judge Pierce cautioned the jury that such evidence could only be considered as bearing on Brown's motive and intent. (Tr. 222, 225). In addition, at the conclusion of the case, Judge Pierce included the following instruction in his charge to the jury:

> "Now, you have heard evidence which may lead you to believe that the defendant was involved in alleged incidents which were similar to those charged in the indict-

[Footnote continued on following page]

As this Court stated in *United States* v. *Miranda*, 526 F.2d 1319, 1331 (2d Cir. 1975), "[i]t is settled law in this Circuit that evidence of similar acts, including other crimes, is admissible when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition." *See also United States* v. *Magnano*, Docket No. 76-0111 (2d Cir. Sept. 7, 1976), slip op. at 5477; *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975); *United States* v. *Papadakis*, 510 F.2d 287, 294-95 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Brettholz*, 485 F.2d 483, 487 (2d Cir. 1973), *cert. denied sub nom. Santiago* v. *United States*, 415 U.S. 976 (1974); *United States* v. *Warren*, 453 F.2d 738 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States* v. *Deaton*, 381 F.2d 114, 117-18 (2d Cir. 1967); *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966).

The evidence of which Brown complains is clearly probative of Brown's knowledge, intent and motive.

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ment in this case. This evidence is not to be considered by you in determining whether the defendant committed the acts charged in the indictment here, or for any other purpose unless you first find that the other evidence you have heard standing alone established beyond a reasonable doubt that the defendant committed the act charged in this indictment. If you find beyond a reasonable doubt, based solely on the evidence other than the alleged similar acts, that the defendant did commit the acts charged in the indictment, then you may consider evidence of the alleged similar acts to whatever extent you wish in determining the state of mind, motive or intent with which the defendant did the acts which you have found occurred.

"If you find that similar acts have been established by the Government, then you may, though you are under no obligation to, draw an inference that in doing the acts charged in the indictment the defendant acted knowingly and intentionally and not because of mistake or accident or other innocent reason." (Tr. 300-301).

Fed. R. Evid. 404(b). Brown was charged in the indictment with causing the interstate transportation of forged money orders. The proof at trial established that Brown directly or indirectly cashed seven out of a group of forty stolen money orders. Therefore, the only real issue for the jury to resolve was whether at the time Brown caused these money orders to be cashed he knew that they were forged or whether he believed them to be legitimate obligations of American Express.* The evidence of similar acts was relevant to the jury's consideration of this issue.

The first item of evidence to which Brown takes exception is the money order on which his fingerprint was found. While this money order is analogous to a similar act, it is more precisely part of the same course of criminal conduct charged in the indictment.** It was not in

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* Indeed, at the very outset of his summation, defense counsel asked rhetorically:

> "I read you the indictment — Has the Government proved knowledge on Maurice Brown's part? Have they shown he had knowledge?" (Tr. 270)

Near the end of his summation counsel reiterated this theme:

> "I submit to all of you that if you go into that jury room and you think about what you have heard, there is a very subtle distinction here, extremely subtle distinction. Whether they proved that Maurice Brown 'transported and caused to be transported in interstate commerce from New York, New York to Denver forged, altered and counterfeit securities [sic] American Express money orders described below,' that he knew that they were. Have they proved he has knowledge? ... The Judge told you they must prove each and every element in this indictment, each and every one." (Tr. 275).

** The money order was part of the same group of sequentially numbered money orders which the jury may have inferred was stolen from Wonder; cashed contemporaneously with the other seven money orders charged in the indictment; and completed in a similar fashion as the other money orders—that is, it was payable to an individual in a large even amount of money.

[Footnote continued on following page]

and of itself evidence of the commission of an additional crime. Rather, the money order assumed significance only when considered in conjunction with the seven money orders charged in the indictment. Thus, Brown was no more prejudiced by admission of this money order than he would have been by its inclusion in the indictment. *See, e.g., United States* v. *Papadakis, supra*, 510 F.2d at 295; *United States* v. *Deaton, supra*, 381 F.2d at 118; *United States* v. *Bozza, supra*, 365 F.2d at 213 & n. 9, in which the similar acts were part of the criminal transactions charged in the indictment.

The second item of contested evidence is the testimony of Arthur Fleming. Fleming's testimony, while not related to the crimes charged in the indictment, was also probative of Brown's knowledge that the money orders charged in the indictment had been forged. Fleming testified that Brown demonstrated to him how to earn money by making a blank check payable to an unknowing third party, and then cashing the check against that individual's bank account. The procedure which Brown demonstrated to Fleming was repeated in the instant case when Brown induced Hall and Burns to cash money orders for him against their bank accounts. While Hall and Burns realized that their accounts were being used, they did not have any inkling that the money orders had been forged. Consequently, Fleming's testimony demonstrated that the course of conduct reflected by the crimes charged in the indictment had previously been employed by Brown for illicit purposes.*

An American Express official testified that most money orders are drawn in odd amounts for specific purposes such as paying utility bills. (Tr. 30-32).

* As Judge Gurfein put it in *United States* v. *Papadakis, supra*:

> "There is no more convincing proof to a jury than that of a pattern of conduct which unfolds before their eyes." 510 F.2d at 295.

Thus, Fleming's testimony was properly admissible to show Brown's knowledge, intent and manner of operation and was not offered "solely to prove criminal character." *United States* v. *Papadakis*, *supra*, 510 F.2d at 294.* The similar acts were closely related in time and subject matter to the crimes charged in the indictment, *United States* v. *Byrd*, 352 F.2d 570, 574-75 (2d Cir. 1965). The admissibility of this evidence was well within the broad discretion of the trial judge, *United States* v. *Natale*, 526 F.2d 1160, 1173-74 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3608 (April 26, 1976), whose determination will rarely be reversed on appeal. *United States* v. *Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3624 (May 3, 1976).

POINT II

The Evidence was More than Sufficient to Prove that Brown Knowingly Caused the Interstate Transportation of Forged Money Orders.

Brown contends that "the Government fell short in meeting its burden of proof that [Brown] had knowingly caused stolen American Express money orders to be transported in interstate commerce. . . ." (Brief at 21).**

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* In fact, Fleming's testimony would have been admissible under the classical, more restrictive, standard which limited introduction of similar act evidence to matters of knowledge, intent and design. *See United States* v. *Papadakis*, *supra*, 510 F.2d at 294; 2 Wigmore, *On Evidence*, §§ 300-04 (3d ed. 1940).

** Indictment 75 Cr. 77 is grounded on the third paragraph of 18 U.S.C. §2314 which proscribes the interstate transportation of "falsely made, forged, altered, or counterfeited securities." Thus, knowledge of the theft of the money orders is not an element for the crimes for which Brown was convicted. *Com-*

[Footnote continued on following page]

This argument is plainly frivolous because, aside from the evidence of similar acts, there was abundant circumstantial evidence from which the jury could properly have found that Brown caused the money orders to be cashed and transported in interstate commerce with full knowledge that they were not legitimate obligations of American Express.

This Court has consistently held that the test of the sufficiency of the evidence is "whether upon the evidence giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable interferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); *accord*, *United States* v. *Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *United States* v. *Taylor*, 464 F.2d 240, 242-45 (2d Cir. 1972). Moreover, in applying this standard to determine sufficiency, the evidence must be viewed in the light most favorable to the Government. *United States* v. *Gerry*, 515 F.2d 130, 134 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Floyd*, 496 F.2d 982, 987 (2d Cir.), *cert. denied sub nom. Miller* v. *United States*, 419 U.S. 1069 (1974); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972). So viewed, there is no question but that the evidence in this case permitted a reasonable mind fairly to conclude guilt beyond a reasonable doubt.

Apart from the evidence of similar acts and Brown's statement to the agents, the evidence relating to the

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pare 18 U.S.C. § 2314 (¶ 2) Once the money orders had been stolen, however, they could never be completed in a fashion to make them legitimate obligations of American Express, (Tr. 15-16) and, accordingly, they were necessarily forged. *See United States* v. *Williams*, 498 F.2d 547, 551 (10th Cir. 1974); *United States* v. *Smith*, 426 F.2d 275, 276 (6th Cir. 1970).

money orders charged in the indictment in and of itself overwhelmingly supports the jury's verdict.* All seven money orders which Brown cashed or helped to cash were part of a group of forty money orders which, the jury could reasonably have inferred, were stolen and forged at the time they were cashed. Brown's awareness that the money orders he cashed at the racetrack and at NBNA were forged can readily be inferred from the manner in which all seven money orders charged in the indictment were filled out and negotiated. These money orders were made payable to three different payees, listed five different individuals as sender with six different addresses in three cities. From the evidence presented, the jury would have been justified in finding that fictitious addresses had been listed on at least six of the money orders.

The three money orders which were cashed directly by Brown each purported to have originated with a different "sender." (GX 1, 2, 7).** In the case of two of these

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* While the jury could not reach an agreement as to five counts in the Indictment, the evidence presented as to those counts may be considered in determining sufficiency of the evidence. *See United States* v. *Lubrano*, 529 F.2d 633, 636 n. 1 (2d Cir. 1975), where the Court held that an acquittal on a substantive count does not preclude reliance upon facts relevant to that count in evaluating the sufficiency of the evidence as to a conspiracy count. The rationale for the decision is even more compelling when applied to counts as to which there was a mistrial rather an acquittal. Moreover, evidence as to these counts is admissible as similar acts, which need only be proven by a preponderance of the evidence. *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975).

** One of the money orders cashed by Brown did not list a sender so that the address could not be verified. (GX 7). Two of the money orders for which the sender could not be located at the address listed on the money order were the subject of the counts as to which the jury returned a guilty verdict. (GX 1, 2).

money orders, the individual designated as sender could not be located at the address listed on the money orders. The address on one of those money orders was, instead of a residential dwelling, a Jewish synagogue. (Tr. 184-185; GX 1, 2, 7). The money orders which Hall and Burns cashed at Brown's behest also purported to have originated with senders who could not be located at the address listed on the money orders. Moreover, the money orders cashed by Hall were completed by Brown in Hall's presence with the names of senders having two different addresses on a nonexistent avenue in Boston, Massachusetts.* (Tr. 52, 181-182; GX 3, 4, 5, 6, 19).

Additional evidence of Brown's guilty knowledge as to the money orders for which he was convicted may be inferred from the fact that Brown went to great lengths to cash four money orders from the same group of forty stolen money orders in ways in which could not easily be traced to him. Thus, even though he had his own bank account he told Hall that he did not have an account and needed his aid in cashing some money orders. Thereafter Brown went with Hall to two different banks to cash two money orders. (Tr. 47-51). Brown then enlisted Hall's aid in having Ruby Burns cash two money orders on successive days at her bank. (Tr. 55-57, 82-92). Moreover, when Hall ran into Brown at the racetrack in 1974 and told him that the money orders which he had cashed for him had been "bad", Brown said that was Hall's problem.

Apart from all of this evidence, the jury's verdict is supported by the similar act evidence. From Fleming's testimony, the jury could fairly infer that in causing the money orders to be cashed in the instant case, Brown

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* The money order bearing Brown's fingerprint had still a different sender and address listed. (GX 8).

was deliberately and knowingly repeating the techniques which he had demonstrated to Fleming.

Finally, Brown's statement to the FBI agents in the courthouse lobby removes any doubt as to his guilty knowledge. While at the time of his arrest Brown maintained that he could not recall where he had obtained the money orders, he approached two FBI agents in the courthouse lobby after his arraignment and asked whether he would have been arrested had he told them where he had obtained the money orders. When one of the agents pointed out that Brown had earlier said he did not remember the source of the money orders, Brown smiled and once again asked whether he would have been arrested had he disclosed his source. (Tr. 179-180, 204-205). The jury certainly could have inferred from Brown's exchange with the agents that not only did he know the source, but that he was seeking to trade this information for lenient treatment.

In the face of this evidence, Brown argues to this Court that he may have "received these money orders in payment of a valid debt . . ." (Brief at 16). This constitutes, at most, an argument for the jury, not a basis for claiming insufficiency of the evidence. However, it is interesting to note that defense counsel chose not to make this speculative and unconvincing argument to the jury when he had the opportunity to do so. His effort to explain away the evidence on this far-fetched basis now is yet further demonstration that the Government's case was more than sufficient.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

MARC MARMARO,
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Of Counsel.

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AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

MARC MARMARO being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 24th day of September, 1976 he served ~~a copy~~ two copies of the within BRIEF by placing the same in a properly postpaid franked envelope addressed:

BARRY J. TELLER, Esq.
125-10 Queens Boulevard
Kew Gardens, New York 11415

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Marc Marmaro

Sworn to before me this
24th day of September, 1976

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977